

ADMINISTRATIVE ENFORCEMENT OF  
ETHICS RULES AND REQUIREMENTS  
THROUGH DISCIPLINARY ACTIONS

## Case List

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**Note:** Many of the cases included in this compilation involved standards of conduct regulations that were superseded by the uniform "Standards of Ethical Conduct for Employees of the Executive Branch" in 5 C.F.R. part 2635, which went into effect on February 3, 1993. Those cases are included for purposes of comparison.

**Alleged Violation of Law or Regulation as Basis for Disciplinary Action:**

"[T]he agency did not charge the appellant with violating its standards of conduct; it charged him with specific behavior that it characterized as 'constituting a conflict of interest and the acceptance of a gratuity.' . . . [T]here is no requirement that an employee must violate a specific written policy before he can be disciplined under [5 U.S.C.] chapter 75. The sole criterion under chapter 75 is that the adverse action be 'for such cause as will promote the efficiency of the service.' See 5 U.S.C. § 7513(a)." Fontes v. Department of Transportation, 51 M.S.P.R. 655, 663 (1991)

"Nothing in law or regulation requires that an agency affix a label to a charge of misconduct. If it so chooses, it may simply describe actions that constitute misbehavior in a narrative form, and have its discipline sustained if the efficiency of the service suffers because of the misconduct." Otero v. U.S. Postal Service, 73 M.S.P.R. 198, 202 (1997)

"The appellant further asserts that the agency did not establish that he violated any statute or specific offense listed in the agency's table of penalties. The agency, however, neither charged nor found the appellant guilty of violating any statutory provision or agency regulation. Instead, it properly described the appellant's misconduct, proved it, and established that the adverse action was 'for such cause as will promote the efficiency of the service.'" Levick v. Department of Treasury, 75 M.S.P.R. 84, 90 (1997).

"[T]he appellant argues that . . . the agency failed to cite a regulation that was violated by his behavior [misuse of government resources] . . . . We find no error in the administrative judge's analysis of this charge, however. . . . [I]t is immaterial that the agency did not cite a particular regulation, because the impropriety of misusing agency property is obvious and need not be addressed specifically in regulations." Brown v. Department of Air Force, 67 M.S.P.R. 500, 506 (1995)

"Here, as to the charge of sexual harassment, the agency has not alleged any events of sexual harassment for which it has not also alleged a violation of 5 C.F.R. § 2635.101(b)(13). Therefore, if the agency can prove that the appellant committed sexual harassment, it will have automatically proven that he violated § 2635.101(b)(13), and thus the alleged regulatory violation merges into the charge of sexual harassment. Similarly, as to the charge of conduct unbecoming a federal employee, the agency has not alleged any events constituting a violation of § 2635.101(a) for which it has not also alleged conduct unbecoming a federal employee. Therefore, if the agency proves that the appellant violated one of the 14 general principles contained in § 2635.101(b),

it will have automatically proven that he engaged in conduct unbecoming a federal employee, and thus the conduct unbecoming charge merges into the alleged regulatory violation." Schifano v. Department of Veterans Affairs, 70 M.S.P.R. 275, 281 (1996)

### **Nexus to the Efficiency of the Service:**

"Real or apparent conflicts of interest are job related, and can engender sanctions against an employee. *Weston v. Department of Housing and Urban Development*, 724 F.2d 943, 949 (Fed. Cir. 1983)." Ferrone v. Department of Labor, 797 F.2d 962, 965 (Fed. Cir. 1986)

"[S]ometimes the violation of ethical standards in civilian employment cases is so egregious as to speak for itself and the nexus between the offenses and the adverse action is thus established." Wynne v. United States, 618 F.2d 121, 124 (Ct. Cl. 1979)

"There are some offenses, such as theft of government property and falsification of government records, which make a nexus between the forbidden conduct and the efficiency of the service 'obvious on the face of the facts.' *Phillips v. Bergland*, 586 F.2d 1007, 1011 (4<sup>th</sup> Cir. 1978); *Hayes v. Department of the Navy*, 727 F.2d 1535, 1539 & n. 3 (Fed. Cir. 1984)." Gonzalez v. Defense Logistics Agency, 772 F.2d 887, \_\_\_\_ (Fed. Cir. 1985)

"The appropriateness of a particular penalty is a separate and distinct question from that of whether there is an adequate relationship or 'nexus' between the grounds for an adverse action and 'the efficiency of the service.' While the efficiency of the service is the ultimate criterion for determining both whether any disciplinary action is warranted and whether the *particular* penalty may be sustained, those determinations are quite distinct and must be separately considered." Goode v. Defense Logistics Agency, 31 M.S.P.R. 446, 449 (1986)

"An appellant's satisfactory performance and the lack of evidence showing that his off-duty conduct was publicized does not rebut the inference arising from the relation between his misconduct and the agency's mission; the agency need not demonstrate a specific impact on the appellant's job performance and the efficiency of the service before taking action against him. . . . Nor is the agency necessarily required to produce evidence explicitly demonstrating that an employee's off-duty conduct adversely impacts on the efficiency of the service; otherwise agencies would have to await actual impairment of service efficiency before taking action, which would be contrary to the public interest." Schumacher v. United States Postal Service, 52 M.S.P.R. 575, 579-80 (1992)

"In support of his contention that the administrative judge erred in finding that disciplinary action would promote the efficiency of the service, the appellant . . . asserts that it would not promote the efficiency of the service to remove an employee whose two most recent performance appraisals were 'outstanding.' . . . Although the appellant's conduct may not have affected his performance ratings, we concur in the administrative judge's finding that the appellant's misconduct interfered with or adversely affected the agency's mission. . . . [I]f the agency were unable to ensure that its investigative records would not be released to the public, it would have a serious impact on its ability to perform its assigned functions." Clark v. Equal Employment Opportunity Commission, 42 M.S.P.R. 467, 475-76 (1989)

"[W]e will not force HUD to continue employing a 'slumlord' in a responsible position until it can prove, by the cumbersome methods of litigation, what ought to be obvious -- that the credibility and effectiveness of the department are undermined by such discordance between public duty and private conduct." Wild v. Department of Housing and Urban Development, 692 F.2d 1129, 1133 (7th Cir. 1982)

"[C]ommission of a crime does not necessarily reflect on the honesty of an individual vis a vis his employment." Gamble v. United States Postal Service, 6 M.S.P.R. 578, \_\_\_\_ (1981)

Nexus between acceptance of a bribe and efficiency of the service. Middleton v. Department of Justice, 23 M.S.P.R. 223 (1984)

Acceptance of food, travel, and lodging from an agency grantee, by an employee responsible for monitoring agency grants, reflected negatively on the agency and undermined agency's confidence in the employee's integrity. Krbec v. Department of Transportation, 21 M.S.P.R. 239, 242-44 (1984), aff'd, 770 F.2d 180 (Fed. Cir. 1985) (Table)

"The sustained charge of conflict of interest has a direct impact upon appellant's responsibilities and the public trust. The charge of falsification [of the appellant's financial disclosure report] is inherently destructive of the agency's faith in an employee's trustworthiness and honesty, essential elements in the relationship of an employer and employee." Connett v. Department of Navy, 31 M.S.P.R. 322, 327-28 (1986), aff'd, 824 F.2d 978 (Fed. Cir. 1987) (Table)

"Book's demonstrated lack of trustworthiness [*i.e.*, his proven unofficial use and unauthorized possession of agency property] is directly connected to his job performance and position as postmaster." Book v. United States Postal Service, 675 F.2d 142, 158, 161 (8th Cir. 1982)

"Inasmuch as government regulations clearly provide that frequent flyer miles derived from official travel are government property, see 41 C.F.R. § 301-1.103(f)(1), there can be no doubt but that discipline based on the sustained charge in this case promotes the efficiency of the service." Lewin v. Department of Justice, 74 M.S.P.R. 294, 299-300 (1997)

"[T]he record does not support the agency's representation . . . that the impact of the letter [evidencing a conflict of interest or apparent conflict of interest] on the agency's ability to perform its mission was [']devastating.[']" Delovich v. Department of Labor, 19 M.S.P.R. 155, 156 (1984)

"[T]he appellant is a member of the Senior Executive Service (SES). An agency may take an adverse action against an SES employee only for misconduct, neglect of duty, malfeasance, or failure to accept a directed reassignment or to accompany a position in a transfer of function. See 5 U.S.C. § 7543(a). . . . [T]he appellant's violation of the agency's regulations constituted misconduct. See 38 C.F.R. §§ 0.735-10(a) ['Each Department of Veterans Affairs employee shall be expected to serve diligently, loyally, and cooperatively; to exercise courtesy and dignity; and to conduct himself or herself, both on and off duty, in a manner reflecting credit upon himself or herself and the Department of Veterans Affairs'], 10(b)(4) ['An employee shall avoid any action which might result in, or create the appearance of losing complete independence or impartiality'], 10(e) ['[M]anagement and supervisors shall encourage the good conduct of employees by setting the example, by dealing with them considerately and impartially, and by showing sincere concern for them as individuals'], 18 ['An employee shall not engage in criminal, infamous, dishonest, immoral, or notoriously disgraceful conduct, or other conduct unbecoming a Federal employee or prejudicial to the Government'], 21(1) ['Employees may not violate the requirements of Civil Service law, rules, regulations, policies and standards administered by or subject to the jurisdiction of the Civil Service Commission (5 C.F.R. 5.4)'] (1993)." Gores v. Department of Veterans Affairs, 68 M.S.P.R. 100, 121 (1995)

Uncontested charges against administrative law judge (ALJ) that he used his government office for commercial display and sale of jewelry and clothing and abused his position by soliciting subordinates to accept his commercial offers constituted "good cause" for disciplinary action within the meaning of 5 U.S.C. § 7521, under which an employing agency may take disciplinary action against an ALJ only for good cause established and determined by the Merit Systems Protection Board on the record after opportunity for hearing. Social Security Administration, Department of Health and Human Services v. Pucci, 27 M.S.P.R. 358 (1985)

### **Charges and Proof:**

"The agency does not meet its burden of proof by merely asserting that appellant violated the standards of conduct. Agency charges and specifications do not constitute evidence." Trachy v. Defense Communications Agency, 18 M.S.P.R. 317, 323 (1983)

"[M]ere charges without more are not sufficient to establish violation of the public trust." Burnett v. U.S. Soldiers' and Airmen's Home, 13 M.S.P.R. 311, 314 (1982)

When an agency charges an employee with a crime, it must prove the elements of the crime. Messersmith v. General Services Administration, 9 M.S.P.R. 150, 157 (1981)

"If an agency charges an employee with willful or intentional misconduct, then the agency must prove willfullness or intent for its charge to be sustained." Baracker v. Department of Interior, 70 M.S.P.R. 594, 599 (1996)

"[I]f the charge in this case had been . . . the unauthorized use of government property for the purpose of personal gain rather than the misuse or abuse of government property, the agency would have been required to prove both unauthorized use and a purpose of personal gain as elements of the charge." Diaz v. Department of Army, 56 M.S.P.R. 415, \_\_\_\_ (1993)

"Appellant's contention that the agency was required to prove appellant's strike activity 'beyond a reasonable doubt' is untenable. The adverse action appeal process is not a criminal proceeding. Under the provisions of 5 U.S.C. 7701(c)(1)(B), the agency must support its charges by a preponderance of the evidence [i.e., that degree of relevant evidence which a reasonable mind, considering the record as a whole, might accept as sufficient to support the conclusion that the matter asserted is more likely to be true than not true]. The agency's burden of proof is not affected by the fact that the action which serves as a basis for the charge is also a violation of a criminal statute. Chisholm v. DLA, 656 F.2d 42 at 48 n. 11 (3rd Cir. 1981)." Perron v. Department of Transportation, 16 M.S.P.R. 382, 388 (1983)

"[W]e find that the administrative judge erred by characterizing the charge as one involving a violation of the statutory provision [covering the misuse of a government vehicle], 31 U.S.C. § 1349(b), because the agency's charge [of misuse of a government vehicle trailer] was not based on the statutory provision." Els v. Department of Army, 82 M.S.P.R. 27, \_\_\_\_ (1999)

"We find that the administrative judge misconstrued this charge. The agency did not charge the appellant with engaging in conduct that was 'unethical, immoral[, ] or indecent.' Instead, the notice



of proposed removal charged him with conduct 'that can be construed as being unethical, immoral[,] or indecent.' . . . Thus, by nature of the language of the notice of proposed removal, the agency should not have been required to show that the appellant's misconduct was unethical, immoral, or indecent, merely that the appellant's actions could be construed as such." Martin v. Department of Air Force, 67 M.S.P.R. 309, \_\_\_\_ (1995)

### **Notice of Rule Allegedly Violated:**

Among the factors considered in evaluating the reasonableness of an agency-imposed penalty is "the clarity with which the employee was on notice of any rules that were violated in committing the offense, or had been warned about the conduct in question." Douglas v. Veterans Administration, 5 M.S.P.R. 280, 305 (1981)

"[L]ack of notice of a regulation alleged to be violated is more appropriately considered as a mitigating factor rather than a defense to the charge." Faitel v. Veterans Administration, 26 M.S.P.R. 465, 468-69 (1985)

"[T]he agency properly considered the factors relevant to this case. In this instance the relevant factors were the clarity of the agency's conflict of interest regulations and whether such regulations put appellant on notice of the impropriety of behavior leading to his removal." Lavelle v. Department of Air Force, 9 M.S.P.R. 234, 235 (1981)

"There is substantial evidence on record that the charges were very serious, that Stanek ignored various warnings and reprimands by his supervisors regarding his unauthorized activities and, therefore, that an additional reprimand or suspension would be insufficient to deter Stanek from repeating his conduct." Stanek v. Department of Transportation, 805 F.2d 1572, 1580 (Fed. Cir. 1986)

"[H]er misuse [of a government computer and printer and e-mail], which was repeated and flagrant, continued over more than a one-year period despite different types of progressive warnings to cease the misuse, i.e., a verbal order, an E-mail message from her supervisor, a written counseling, and the fourteen-day suspension. . . . Moreover, even though the arbitration decision canceled the suspension, it does not warrant modification of the administrative judge's finding that the agency's reliance upon the suspension was proper to the extent that it showed that the appellant was on notice, prior to July 1, 1994, that her misuse of the computer would not be tolerated and that despite all warnings to discontinue her misconduct, she persisted." Rush v. Department of Air Force, 69 M.S.P.R. 416, 418-19 (1996)

"The appellant also claims that, while he was aware of the regulations prohibiting such use, there was in the Guam office an unofficial policy allowing personal use of frequent flyer miles accrued based on official travel and that, therefore, he was not on notice that such use was, in fact, prohibited. Specifically, the appellant claims that he relied on [his supervisor's] statement to him that the miles he accrued were his to use. Even if [his supervisor] made such a statement [which his supervisor denied having made], the appellant's reliance on it could not justify his actions. See, e.g., *Fuqua v. Department of the Navy*, 31 M.S.P.R. 173, 177 (1986). Moreover, we are not persuaded that someone at the appellant's grade level with his years of experience in law enforcement would accept without question the truth of such a statement, even if made, in the absence of any written support for it and in view of the many bulletins setting forth the government-wide prohibition, . . . of which he was admittedly aware." Lewin v. Department of Justice, 74 M.S.P.R. 294, 301 (1997)

"For the reasons stated below, however, we find that the appellant knew at the time he used the computer that this use was improper. First, we note that the appellant holds a supervisory program analyst position at the GM-14 level, and that the incumbent of such a position is unlikely to be ignorant of the agency's general prohibition on using official property for personal business. Second, the record shows that another employee who was found to have used the computer for business other than that of the agency stated, during an agency investigation of the appellant's case, that the appellant had authorized part of this usage, and the appellant was reported by one of his subordinates to have said that he thought this authorized activity, which concerned the employee's naval reserve unit, was proper 'because it was government related.' In addition, according to the agency investigative report, one of the appellant's supervisors stated that he had discussed the 'policy about using government owned equipment for government work only . . . generally with [the appellant] on a number of occasions;' and that he had questioned the appellant's use of the computer to type a complaint about agency management, but 'let the matter drop' after the appellant claimed the use was appropriate. We believe these statements, whose accuracy the appellant has not denied, indicate that the appellant knew that uses of the computer which were not government-related would not be proper. Furthermore, although the record does not show the dates on which the conversations described above occurred, the short time between the date of the appellant's most recent improper use of the computer and the date on which the agency discovered this uses indicates to us that it is probable that most or all of the conversations took place before the appellant stopped using the computer for his personal business. Third, the record shows that the appellant's supervisor told the investigators that the appellant, on being informed that his personal documents had been discovered in the computer's memory, responded by saying that he had had personal problems, and that he had not used the computer in this manner for a long time.

When the supervisor pointed to an entry which indicated that some of the appellant's personal use had occurred only 36 days before the date on which this conversation occurred, the appellant is reported to have stated, 'I can take care of that,' to have used a computer terminal in the room in which the conversation took place to erase the entire set of documents, and to have stated, 'There, it's gone, now what do you have?' The appellant has admitted having erased the documents, and apparently has not denied making the statements his supervisor attributed to him. These actions and statements do not appear to be consistent with the appellant's allegation that he was unaware, at the time he was using the computer for his personal business, that this usage was improper." Lemmon v. Department of Agriculture, 23 M.S.P.R. 506, \_\_\_\_-\_\_ (1984)

"[T]he appellant's supervisors advised him of their perceived conflict of interest in his continued outside photographic business and the agency's arts and crafts program. . . . [D]espite these instructions he continued his private business. . . . [T]he appellant sought legal advice regarding the presence of a conflict of interest from an agency attorney who was assigned to the base where he worked. However, the attorney informed the appellant that he was unable to provide him with any guidance, since an advisory opinion could be given only at the request of management. Thus, despite the appellant's request, he was unable to obtain ethics advice from the agency. Moreover, even though the appellant's supervisors knew that the appellant had sought legal advice and guidance regarding a possible conflict of interest and that he believed that there was none, the agency did not inform the appellant until after his proposed removal that they had requested and received a legal memorandum from the agency attorney which found actual and apparent conflict of interest. Indeed, the memorandum set forth the necessary recommendations or guidelines to correct the situation, specifying that the agency should notify the appellant in person and in writing, if necessary of the conflict of interest and the possible remedies; but, the agency ignored it. Thus, it appears that the appellant never received notice that he was in violation of the agency regulations." Frickey v. Department of Army, 61 M.S.P.R. 475, 478-481 (1994)

"[S]ince the . . . appellant reviewed the agency's standards of conduct only five months before the first occasion on which he used the photocopying machine, it follows that appellant knew, or should have known, that his conduct was in violation of agency regulations." Moore v. Department of Army, 32 M.S.P.R. 277, 279 (1987)

"We further find that appellant was provided actual notice of the regulation under which he was charged. The agency introduced evidence that on September 13, 1973, appellant was given a copy of [his agency's Standards of Employee Responsibilities and Conduct regulation] for which he was required to sign. Appellant admitted receiving and signing for the regulation but denied having read it prior to the alleged misconduct. We find that appellant's

acknowledged receipt of the regulation several years prior to the alleged misconduct constituted actual and timely notice and that any failure by appellant to familiarize himself with the regulation amounted to lack of due diligence." Sanchez v. Department of Justice, 14 M.S.P.R. 79, 82 (1982)

"In assessing the appropriateness of a penalty, the Board may also consider the clarity with which an employee was on notice of rules which were violated in committing the offense. . . . In the present appeal, the agency's Standards of Employee Responsibilities and Conduct, which the appellant received when he began work with the agency in 1987, explicitly prohibit the acceptance of a gift or favor from, or any financial involvement with, an inmate. Perrodin v. Department of Justice, 55 M.S.P.R. 407, 413 (1992)

"[C]ontrary to the . . . finding that there was no evidence to show that appellant had been specifically advised of the potential for abuse in [misusing a Government airplane], or of the possible agency action should abuse occur, the record shows that appellant was presented twice yearly with a copy of the agency's standards of conduct and accompanying table of penalties. Thus appellant was aware of the possible range of agency response to his misbehavior." Hedgecock v. Department of Army, 20 M.S.P.R. 333, 336 (1984)

"[H]e asserts that he was not on notice that his actions were wrong. Yet, the record establishes that the agency prohibited inspectors from having a direct or indirect financial interest that conflicted substantially, or appeared to conflict substantially, with their duties. . . . The employee handbook noted this prohibition, and . . . [t]he agency trained its inspection employees, including the appellant, in conduct and ethics." Reynolds v. Department of Agriculture, 54 M.S.P.R. 111, 114 (1992)

"[A]ppellant signed a memorandum indicating that he had read and understood the rules . . . upon his arrival at his new position." Baracker v. Department of Interior, 70 M.S.P.R. 594, 603-04 (1996)

Appellant was on notice of the conflict, having been told he had 60 days to resolve it or else be subject to disciplinary action. Schumacher v. U.S. Postal Service, 52 M.S.P.R. 575, 581 (1992)

"[E]ven if the code is vaguer than we think, this would not help Wild, because his superiors warned him for more than a year before actually discharging him . . . . Two years of explicit warnings is a sufficient grace period." Wild v. Department of Housing and Urban Development, 692 F.2d 1129, 1131 (7th Cir. 1982)

"[T]he standards of conduct are largely a matter of common sense and cover an area for which employees must be presumed to know the law." Coons v. Department of Navy, 15 M.S.P.R. 1, 4 (1983)

Agency's failure to follow its regulations requiring it to bring suspected ethical violations to the employee's attention, and requiring it to pursue the matter with its designated agency ethics official, was not harmful procedural error because agency's compliance with the regulations would not have been likely to cause the agency to reach a conclusion different from the one it reached. Coughlan v. Department of Air Force, 35 M.S.P.R. 230, 232 (1987)

### **Public Trust:**

"[T]his dishonest conduct violated 5 C.F.R. § 2635.101(b)(1), which provides that '[p]ublic service is a public trust, requiring employees to place loyalty to the Constitution, the laws and ethical principles above private gain.' By intentionally entering incorrect information on the [agency's Federal Express] airbill, apparently in an attempt to avoid detection [when sending personal documents], the appellant did not place loyalty to ethical principles above her interest in private gain. Therefore, . . . the appellant engaged in dishonest conduct in violation of 5 C.F.R. § 2635.101(b)(1)." Mann v. Department of Health and Human Services, 78 M.S.P.R. 1, 11 (1998)

### **Appearance Issues:**

"A democracy is effective only if the people have faith in those who govern, and that faith is bound to be shattered where high officials and their appointees engage in activities which arouse suspicions of malfeasance and corruption." United States v. Mississippi Valley Generating Co., 364 U.S. 520, 562 (1961)

"[T]he charge of giving the appearance of impropriety is a legitimate exercise of the agency's authority to proscribe certain conduct as a matter of management discretion." Rayfield v. Department of Agriculture, 13 M.S.P.R. 444, 449 (1982)

"The charges for which appellant was removed are serious. This Board has sustained removals based on the charge of creating an appearance of conflict of interest. . . . Creating the appearance of a conflict of interest constitutes a serious breach of trust. The Government clearly has an interest in prohibiting such conduct, and in ensuring that its agents and employees are not compromised in the performance of their duties as a result of any outside influences." Coons v. Department of Navy, 15 M.S.P.R. 1, 5 (1983)

"Fundamental fairness precludes disciplining an employee for conduct unless he or she should have known it would appear improper to a reasonable observer under the circumstances. . . . The OGE

has recognized that '[a]pppearance questions require decisions on a case-by-case basis. . . .' [OGE Informal Advisory] Letter No. 86 [x] 6, June 23, 1986." Special Counsel v. Nichols, 36 M.S.P.R. 445, 455 (1988)

Conduct that does not involve any actual wrongful use of public office for private purposes may nonetheless create an appearance of such misconduct. Burnett v. U.S. Soldiers' and Airmen's Home, 13 M.S.P.R. 311 (1982)

"Proof of an appearance of a conflict of interest is insufficient where the agency . . . charges the employee with an actual conflict of interest." Fontes v. Department of Transportation, 51 M.S.P.R. 655, 664 (1991)

"The agency's final decision letter specifically based the removal on the grounds that there was a real conflict between her private interests (her husband's position with the operating contractor [of the agency installation where she worked]) and her official duties as administrative officer. . . . [T]he presiding official correctly found that there had been no evidence presented by the agency that any of the appellant's duties as administrative officer or any decision in which she participated . . . or with respect to which she advised would reasonably have a direct and predictable effect upon the operating contractor which employed her husband. Nor will the record support a finding of an appearance of a conflict of interest which requires a showing that the performance of official functions will reasonably have or create the appearance of having an effect on the outside interest. Since the appellant's official functions did not involve contractor negotiations or place her in a position where she would be privy to any information involving negotiations with her husband's employer, it cannot be concluded that performance of her official function would reasonably create an appearance of having an effect on outside interests." Lane v. Department of Army, 19 M.S.P.R. 161, 162 (1984)

"[A]ppellant's financial interest in the sale of the VA property to [relatives of a co-worker] -- due to the prospect of interest payments [from them] on the loan -- gives the appearance of a conflict with his official duties as a reality [sic] specialist involved in the sale of VA properties. The financial relationship also resulted in the appearance that favoritism or prejudice existed in the bidding process for the purchase of VA properties." Marler v. Department of Veterans Affairs, 58 M.S.P.R. 116, 121 (1993)

### **Disclosure of Waste, Fraud, Abuse, and Corruption:**

"[W]e note that 5 C.F.R. § 2635.101(b)(11) sets forth the ethical requirement that Federal employees 'shall disclose waste, fraud,

abuse, and corruption to appropriate authorities.' We discern nothing in the regulation, however, that calls into question the . . . Board's holding in *Walsh* [*v. Department of Veterans Affairs*, 62 M.S.P.R. 586 (1994), *aff'd*, *King v. Erickson*, 89 F.3d 1575 (Fed. Cir. 1996)] regarding self-implication. Accordingly, we find that, despite the requirement of 5 C.F.R. § 2635.101(b)(11), an employee cannot be required to make a disclosure that would implicate himself or herself in wrongdoing." *Barrett v. Department of Interior*, 65 M.S.P.R. 186, 201 (1994), rev'd sub nom., *LaChance v. Erickson*, 522 U.S. 262 (1998)

"Not only did [t]he [appellant] allow misuse [of agency property for personal gain] to occur, he attempted to conceal his knowledge of such misuse, in violation of his obligation as a supervisor to prevent and report it." *Gootee v. Veterans Administration*, 36 M.S.P.R. 526, 530 (1988), petition for review dismissed, 39 M.S.P.R. 495 (1989) (Table)

"The Board found that Mr. Morgan was derelict in his duty by participating in and failing to control or report the improper actions of his subordinates. His involvement was more than that of a bystander. As a supervisory police officer Mr. Morgan was responsible both to uphold the law and to maintain appropriate standards of performance and integrity among his subordinates. *Brewer v. United States Postal Service*, 647 F.2d 1093, 1098 (Ct. Cl. 1981), *cert. denied*, 454 U.S. 1144 (1982)." *Morgan v. Department of the Army*, 934 F.2d 310, \_\_\_\_ (Fed. Cir. 1991)

"[He] does not allege that such purchases were wasteful, *i.e.*, significantly out of proportion to the benefits reasonably expected to accrue." *Smith v. Department of Army*, 80 M.S.P.R. 311, 316 (1998)

"With respect to the appellant's disclosures regarding an alleged conflict of interest involving a former agency attorney, the appellant may have had a reasonable belief that the former employee who represented a taxpayer before the agency violated federal ethics laws. See 18 U.S.C. § 207 (prohibiting former government employees from appearing before federal agencies in particular circumstances). Yet, even if the former employee violated these laws, he did so after he left the government's employ. Thus, although the appellant alleged that he disclosed this violation to the District Director and directed another agency employee to report it to the agency Inspector General, such disclosures were not protected by the WPA [Whistleblower Protection Act] because they did not disclose abuses by government personnel. See *Willis* [*v. Department of Agriculture*], 141 F.3d [1139] at 1144 [(Fed Cir. 1998)] ('The WPA is intended to protect government employees who risk their own personal job security for the advancement of the public good by disclosing abuses by government personnel') (emphasis added)." *Coons v. Department of Treasury*, 85 M.S.P.R. 631, \_\_\_\_ (2000)

### **Clearance by Ethics Official:**

"[A]lthough he did note his interest in the property to the agency by completing an annual disclosure statement which was approved by the Ethics Officer, the record indicates that the Ethics Officer is located in an office about 150 miles away, . . . and there is nothing contained in the statement which would have alerted the Ethics Officer that the land was newly purchased or would otherwise have identified the land as trust property." Moffer v. Department of Interior, 8 M.S.P.R. 453, 457 (1981), aff'd on other grounds, Moffer v. Watt, 690 F.2d 1037 (D.C. Cir. 1982)

Employee reasonably believed his supervisor had authority to approve his outside employment. Van Fossen v. Department of Housing and Urban Development, 748 F.2d 1579 (Fed. Cir. 1984)

Under agency's procedures, only an ethics official could approve outside employment. Currie v. Department of Housing and Urban Development, 21 M.S.P.R. 720, 726-721 (1984)

### **Confidentiality of Ethics Advice:**

"Respondent also now objects to the testimony of the Base legal officer as privileged information. This witness had advised respondent his serving as a delegate [at political party conventions] was prohibited [by the Hatch Act]. Respondent's claim that he and the Base Officer were in an attorney-client relationship at the time has no support in the record and is contrary to the evidence that the legal officer was acting in his capacity as legal officer for the Base when he advised respondent." Special Counsel v. Winfield, 18 M.S.P.R. 402, 407 (1983)

Although uncontested evidence showed that ethics officials had informed the employee prior to giving him advice (on the conflict of interest statutes) that they were acting as representatives of the Government and not as his personal attorneys, the court found that based on the procedures used -- an intake questionnaire which indicated that it was to be filled out by the client and that information placed thereon was privileged -- a reasonable non-lawyer could have understood the advice to be confidential. United States v. Schaltenbrand, 930 F.2d 1554 (11th Cir. 1991)



### **Gifts from Outside Sources:**

"In the days of Rameses I, we suppose, the one-way flow of gifts to those deputized to administer government affairs, from those obliged to do business with them, already was an ancient institution. Of course, the impartiality of the donees was in theory not impaired. That would be bribery, of which perish the thought. In many cultures the esteem and love of the citizen for the official was expected to be so large and dependable, it was relied on for the latter's subsistence, no salary or a nominal one only being provided. Sometimes incumbents even had to purchase their offices. That is, perhaps, the normal way to do things. Here in the United States we undertake to maintain an exception. The Congress appropriates funds to provide what it deems adequate salaries, frequently adjusted, for those who execute its laws, and on the other hand, the effort is made to restrict the citizenry to expressing its good will towards them in tokens other than money and articles of value. It may well be anticipated, however, that the smallest leak in the dike will swiftly widen, and the old river of gratuities will again flow in the old way. Human nature will reassert itself. It may not be unreasonable, therefore, to believe that what is required is a combination of emphatic warnings and drastic penalties. If at times, as here, this results in tragically wrecking an honorable career for an infraction apparently not of the gravest, this is part of the price that must be paid to maintain the respect and the self-respect of our Government." Heffron v. United States, 405 F.2d 1307, 1312-13 (Ct. Cl. 1969)

"[T]he appellant's accepting a gratuity under the circumstances of this appeal do not warrant [his] removal. The appellant admitted that he attended a class valued at \$60.00 and paid for by an agency contractor. Because the gratuity was not of significant value, the appellant did not repeat his act, and there is no evidence to show that he acted maliciously or for gain or that the contractor received any special consideration for providing the gratuity to the appellant, mitigation [of the penalty] is warranted." Wells v. Department of Defense, 53 M.S.P.R. 637, 644-45 (1992)

"[Accepting] gifts from claimants is a violation of agency regulations because, even without a quid pro quo, it gives an appearance of corruption." Herrera-Martinez v. Social Security Administration, 84 M.S.P.R. 426, \_\_\_\_ (1999)

"The record reveals that the appellant accepted cash gratuities over a period of several years, for delivering checks. Such conduct was clearly prohibited by the agency's policies and regulations." Edwards v. United States Postal Service, 26 M.S.P.R. 85, \_\_\_\_ (1985)

"[W]e must accept the MSPB's interpretation of the letter [from Stanek] to Lang [a person having an interest affected by Stanek's

performance of his official duties] . . . . Although the letter expressly requested only 'advice' regarding obtaining a loan [to help Stanek pay legal fees to pursue his whistleblowing activities and to help him get through his divorce], a reasonable interpretation of this, though not the only one, indicates that Stanek was looking for more than advice from Lang. Stanek's letter, in addition to violating 5 C.F.R. § 735.202(a)(3) regarding direct solicitation of a loan, created the appearance of impropriety. See 5 C.F.R. § 735.201a(a) (employee shall avoid any action which might create the appearance of using public office for private gain). . . . [T]he solicitation, as found, was an extremely serious act of misconduct that, if tolerated, would impair the integrity of the Federal Government far more than personal use of government equipment. Stanek v. Department of Transportation, 805 F.2d 1572, 1577 (Fed. Cir. 1986)

Acceptance of food, travel, and lodging from an agency grantee, by an employee responsible for monitoring agency grants, reflected negatively on the agency and undermined agency's confidence in the employee's integrity. Krbec v. Department of Transportation, 21 M.S.P.R. 239 (1984), aff'd, 770 F.2d 180 (Fed. Cir. 1985) (Table)

"Massa argues that although he admittedly *received* the benefit of admission to the racetracks, there is nothing in the record to prove that he *accepted* this benefit from Potoker [an employee of an agency contractor]. To sustain its charge of [knowingly] accepting gratuities from a government contractor, the agency must prove that Massa had actual or constructive knowledge that he was receiving something of value from a contractor. . . . Nothing in Potoker's sworn statement or the other reports demonstrates that Massa knew or should have known that Potoker paid any part of the expenses for the outings. While issues such as knowledge and intent are often proved by circumstantial evidence, the agency must 'do more than create a suspicion of the existence of the fact to be established.' Universal [Camera Corp. v. NLRB], 340 U.S. [474] at 477. This has not been done." Massa v. Department of Defense, 815 F.2d 69, 72-73 (Fed. Cir. 1987)

"[F]acts can reasonably be interpreted to demonstrate Baker's actual or constructive knowledge that he 'was receiving something of value *from a contractor*,' . . . rather than a personal friend." Baker v. Department of Health and Human Services, 912 F.2d 1448, 1455 (Fed. Cir. 1990)

"The administrative judge found that the appellant had misused his position when he purchased transmissions at reduced prices from two of the facility's suppliers. . . . It was appropriate in this case for her to discern the essence of the appellant's varied exculpatory assertions, namely, that the 'reduced' prices were generally available, and, in reliance upon the contrary testimony of another employee, to find that contention to be untrue." Kirkpatrick v. United States Postal Service, 74 M.S.P.R. 583, \_\_\_\_ (1997)

"The appellant was removed from his position [at a Federal prison] . . . for accepting . . . a \$100 bill from an inmate. . . . [T]he administrative judge properly rejected as not credible the appellant's explanation that he did not intend to keep the money and that he thought he was assisting in [a] drug investigation. . . . [T]he appellant admitted to possessing the money for over three hours without reporting it and to leaving the prison at the end of his shift without turning the money in; the appellant also conceded that he did not admit that he had the money, even after being questioned, until his hands were exposed to [a] black light [that revealed traces of a theft-detection powder]. . . . [T]he preponderance of the evidence . . . established that the appellant had received a gift or favor from . . . an inmate . . . ." Perrodin v. Department of Justice, 55 M.S.P.R. 407, 409-11 (1992)

"[C]harge, which involved appellant's attempt to influence a contractor into hiring one of appellant's associates as a subcontractor, was correctly found by the presiding official to be unsupported by the preponderance of evidence. . . . The agency's contention that the presiding official construed too narrowly the regulation which prohibits employees from soliciting anything of monetary value for 'himself or any member of his family,' is without merit. While we agree with the agency that the gravamen of the regulation is the solicitation of a benefit, there is no evidence that appellant or his family received any benefit from his suggestion." Faitel v. Veterans Administration, 26 M.S.P.R. 465, 469-70 (1985)

"Since the loss and replacement of the watch resulted in no net gain to the appellant, we conclude that the replacement watch would constitute an improper gift or gratuity only if the hotel would not have replaced the watch but for the appellant's position with the FAA. . . . Under the existing record, we find that the agency failed to prove by a preponderance of the evidence that it was the appellant's status as an FAA employee, and not some other factor, that impelled the hotel to replace the missing watch. We therefore conclude that the replacement watch did not constitute an improper gift or gratuity." Fontes v. Department of Transportation, 51 M.S.P.R. 655, 666 (1991)

"The notice to Gonzalez of his proposed removal charged him with . . . (4) accepting gratuities (whiskey) in violation of written standards of conduct sent to each DLA employee by DLA and acknowledged by petitioner. . . . On the present appeal Gonzalez does not deny any of the charges against him. Instead, he raises several affirmative, technical defenses . . . . Since the charges are not denied, they need not be discussed in any detail but we are impressed by their seriousness to the efficient, honest operation of the government and to the particular mission of the DLA." Gonzalez v. Defense Logistics Agency, 772 F.2d 887, \_\_\_\_ (Fed. Cir. 1985)

### **Loan from Subordinate Employee:**

Solicitation and acceptance of loans from seven subordinates and solicitation of a loan from another subordinate (who declined to make the loan) "constitute a very serious breach of the employer-employee relationship." Slaughter v. Department of Agriculture, 56 M.S.P.R. 349, 357 (1993)

"[A]ppellant's failure to repay loans from agency employees, including three under his supervision, had a deleterious effect on the efficiency of the service. As a supervisor, the appellant used his position to obtain money from his subordinates, whether advertently or inadvertently. In failing to repay loans from subordinates and other agency employees, the appellant created a situation in which several employees understandably resisted the appellant's authority as their supervisor and others including his own supervisor challenged his trustworthiness in personal or official matters." Yamauchi v. Department of Navy, 7 M.S.P.R. 671, 673 (1981)

"[W]e find that petitioner accepted loans from subordinates . . . . Petitioner . . . argued that the subordinates loaned the money based on their friendship with petitioner, however, we find that petitioner failed to show that the friendship falls within the exception to the . . . Regulation regarding gifts between subordinates and supervisors." Fine v. Peters, MSPB No. PH-0752-99-0004-I-2, Petition No. 03A00065, U.S. Equal Employment Opportunity Commission, 2000 EEOPUB LEXIS 4525 (June 22, 2000)

Borrowing money from subordinates "involves a situation in which a supervisor used his position to exploit his subordinates, thereby losing the respect and support of co-workers." Vargas v. United States Postal Service, 83 M.S.P.R. 695 (1999)

### **Conflict of Interest:**

"To prove the existence of a conflict of interest, an agency must establish that its employee was acting in two separate capacities, at least one of which involved his official duties, and that the nature of his interests or duties in one capacity had a 'direct and predictable effect' on his interest or duties in his other capacity." Fontes v. Department of Transportation, 51 M.S.P.R. 655, 663 (1991)

"Appellant contends that the correct test for establishing a conflict of interest is whether the employee might reasonably anticipate that his government action or the decision in which he participates or with regard to which he advises will have a direct and predictable effect on his outside financial interest. This

test is drawn from a paraphrase of 18 U.S.C. § 208 . . . . Because appellant was not specifically charged with violating this statute, the test does not apply to this case." Connett v. Department of Navy, 31 M.S.P.R. 322, 325 (1986), aff'd, 824 F.2d 978 (Fed. Cir. 1987) (Table)

"The first two reasons supporting the charge are based on conduct which the agency expressly alleged to be prohibited by [a criminal statute]. . . . Therefore, the agency had the burden of establishing by a preponderance of the evidence the elements of the criminal misconduct charged." Oddo v. Department of Treasury, 13 M.S.P.R. 483, 486 (1982)

"Appellant's partnership . . . had, as its central purpose, a function so closely related to the duties imposed by his Federal employment that on its face it gave rise to a prohibited conflict of interest." Deal v. Department of Justice, 11 M.S.P.R. 370, 372 (1982)

"That appellant maintained an interest in a corporation which had as its central purpose a function so closely related to the duties imposed by his federal employment, and even more significantly advocated awarding a contract to [the corporation] on at least one occasion, on its face gives rise to a prohibited conflict of interest. The Government clearly has an interest in prohibiting such conduct, and in ensuring that its agents and employees are not compromised in the performance of their duties as a result of any outside influences." Smith v. Department of Interior, 6 M.S.P.R. 84, 87 (1981)

"The appellant's continuing responsibility for the security and maintenance of the property for which he had undertaken to loan purchase money brought the loan agreement into conflict with the appellant's official duties." Marler v. Department of Veterans Affairs, 58 M.S.P.R. 116, 121 (1993)

"[C]harge, which involved appellant's attempt to influence a contractor into hiring one of appellant's associates as a subcontractor, was correctly found by the presiding official to be unsupported by the preponderance of evidence. The record reflects that . . . the subcontractor whom appellant openly suggested was not related to him nor did appellant have an interest in the subcontractor's business." Faitel v. Veterans Administration, 26 M.S.P.R. 465, 469-70 (1985)

### **Preferential Treatment:**

"[P]referential treatment of a subordinate employee is a serious offense because it undermines the public and employee confidence in the integrity of government officials." McIntire v. Federal Emergency Management Agency, 55 M.S.P.R. 578, 588 (1992)

An "abuse of authority" occurs when there is an "arbitrary or capricious exercise of power by a Federal official or employee that . . . results in personal gain or advantage to himself or to preferred other persons." Embree v. Department of Treasury, 70 M.S.P.R. 79, 85 (1996)

"A suspicion grounded on the mere fact that respondent hired and then promoted a friend and former colleague is an insufficient basis for finding a violation of the regulation [prohibiting actions creating the appearance of giving preferential treatment]." Special Counsel v. Nichols, 36 M.S.P.R. 445, 456 (1988)

"Absent a prohibited purpose, such as laying a basis for improperly benefitting the employee to whom work is assigned, the discretionary decisions of managers concerning the assignment of work do not constitute abuse of authority within the meaning of § 2302(b)(8)." Special Counsel v. Spears, 75 M.S.P.R. 639, \_\_\_\_ (1997)

Proof of prohibited personnel practice under 5 U.S.C. §§ 2302(b)(6) and (b)(11) (preselection in competitive hiring) automatically also proves a violation of prohibition against an employee's acting in a way that might result in or create the appearance of giving preferential treatment to any person. Special Counsel v. Byrd, 59 M.S.P.R. 561, 581 (1993), stay denied, 60 M.S.P.R. 649 (1994), enforcement granted, 63 M.S.P.R. 19 (1994), aff'd, Byrd v. Merit Systems Protection Board, 39 F.3d 1196 (1994) (Table)

"[A]ppellant contends that the presiding official erred in finding that appellant treated his wife in a disparate manner from other employees [under his supervision]. Specifically, appellant argues that although his wife was allowed to dictate correspondence to other employees of equal grade and status, appellant was not the only supervisor who allowed this to take place. Appellant further contends other employees were allowed to dictate correspondence to equal-level employees. . . . [E]ven if appellant's contentions are correct, they do not establish that appellant was not showing favoritism to his wife." Rentz v. United States Postal Service, 19 M.S.P.R. 35, 37 (1984)

"Taken as a whole, preponderant evidence establishes that for the period of time during which Mr. Begley was repeatedly selected for promotion in derogation of Mr. Sjogren's repromotion rights, appellant gave Mr. Begley preferential treatment." Rayfield v. Department of Agriculture, 13 M.S.P.R. 444, 448 (1983)

### Use of Public Office for Private Gain:

"[T]he sustained charge that the appellant used his position for personal gain is a very serious one." Gonzalez v. Department of Air Force, 51 M.S.P.R. 646, 654 (1991)

"A charge of using one's public office for private gain cannot be sustained when no private gain has been shown." Mann v. Department of Health and Human Services, 78 M.S.P.R. 1, 8 (1998)

"With respect to the first sustained charge, appellant essentially argues that since the presiding official found that appellant had not gained financially from any business arrangement with protected witnesses, the charge that he used his official position for personal gain cannot be sustained. . . . Notwithstanding appellant's arguments to the contrary, the charge may properly be sustained without a specific finding of financial gain to appellant. The thrust of the charge is not that appellant gained financially from his business relationships with protected witnesses but that he improperly entered into such relationships for personal gain." Lappin v. Department of Justice, 24 M.S.P.R. 195, 196 (1984)

"[T]he administrative judge concluded that . . . the appellant used his position to further a private interest. . . . The appellant contends . . . that the administrative judge erred in finding that the appellant was motivated by personal gain. . . . The administrative judge stated that, to show that the appellant used his position to further a private interest, 'the agency need show only that an appellant's position was used with the purpose of obtaining personal gain, not that any actual gain was acquired.' . . . We find that the administrative judge had no basis on which to find that the appellant used his position to obtain a personal gain. The appellant was charged only with furthering a private interest . . . . Therefore, we find that the administrative judge erred in this regard." Lambert v. Department of Army, 44 M.S.P.R. 688, 696-97 (1990)

Agency proved its charge of attempted use of public office for private gain where it established that a Building Manager, using her position in the Government, ordered (but later cancelled or returned) building materials that she intended to use to restore a personal residence. Burkett v. General Services Administration, 27 M.S.P.R. 119, 121-22 (1985)

An "abuse of authority" is the arbitrary or capricious exercise of power by a Federal official or employee that results in any personal gain or advantage to himself or to preferred other persons. D'Elia v. Department of Treasury, 60 M.S.P.R. 226, 232-33 (1993)

"[A]ppellant misused his office by conducting a background check on [a person who owed money to one of his confidential informants]

with the agency's computer." Aiu v. Department of Justice, 70 M.S.P.R. 509, \_\_\_\_ (1996), review reinstated, 95 F.3d 1164 (Fed. Cir. 1996) (Table), aff'd, 98 F.3d 1359 (Fed Cir. 1996) (Table)

"The appellant took advantage of his supervisory Postal Service position to obtain access to the former Maintenance Office at the DMU, where he took photographs of a nude prostitute and submitted them to [a] magazine for publication, for which he was paid. . . . We find that . . . the appellant used his supervisory position for private gain." Uske v. United States Postal Service, 60 M.S.P.R. 544, \_\_\_\_ (1994)

"The fifth charge, however, alleging that the appellant gave the appearance of a conflict of interest, is one whose seriousness warrants disciplinary action. The core specification of the charge involved the appellant's unauthorized use of an INS computer to investigate the impoundment of [a friend's] vehicle on her behalf, while the other specifications implicated similar situations in which the appellant improperly pursued minor personal matters during the course of his official duties." Fischer v. Department of Treasury, 69 M.S.P.R. 614, 618 (1996)

"[T]he appellant took advantage of his position [as a Criminal Investigator] to coerce a confidential informant to have sex with him." Rackers v. Department of Justice, 79 M.S.P.R. 262, \_\_\_\_ (1998), aff'd, 194 F.3d 1336 (Fed. Cir. 1999) (Table)

"The appellant's use of his BOP [Bureau of Prisons] identification card in a bid for 'professional courtesy' on the occasion of his . . . arrest . . . constituted an improper attempt to escape the processes of law by virtue of his status as a law enforcement officer." Todd v. Department of Justice, 71 M.S.P.R. 326, 331 (1996)

Use of unauthorized identification badge to purchase a firearm for personal use. Padilla v. Department of Justice, 64 M.S.P.R. 413 (1994)

#### **Unauthorized Commitment:**

"[T]he agency alleged that appellant, without authority, promised a volunteer instructor that the agency would recompense her in the amount of \$20 a week for her expenses in violation of specific instructions and agency regulations. . . . Appellant alleges that the presiding official erred in excluding as irrelevant evidence that the agency had the money to pay the instructor. The presiding official found that it did not relate to the central issue of whether appellant 'made a promise to do something that he had no authority to authorize.' We do not find that the presiding official erred in excluding such evidence. It was appellant's



alleged unauthorized promise that would have brought discredit to the agency, not the agency's failure to make an unauthorized payment." Ott v. Department of Army, 14 M.S.P.R. 642 (1983)

### **Endorsements:**

"The agency argues . . . that the presiding official erred in failing to find that . . . appellant's appearance in Canada with Mr. Kielsohn of TEQCOM, Inc. constituted a standard of conduct violation. The agency asserts that because the presiding official based her finding on the fact that the Canadians did not interpret appellant's presence at the Canadian demonstration as an endorsement of TEQCOM equipment, she misinterpreted the intent of the [Standards]. The correct question, it asserts, is not how the Canadians viewed appellant's attendance but rather how other commercial vendors and government users of AUTODIN [the agency's worldwide communications system] would view his attendance. In response to the agency's petition appellant argues that even if the standard is as the agency suggests . . ., it nevertheless failed to prove this specification since there is not evidence of record indicating that anyone viewed appellant's appearance in Canada as improper or a conflict of interest. . . . Contrary to the agency's assertion, we find no evidence of record indicating that appellant's conduct or appearance at the Canadian demonstration was perceived as in conflict with the interests of the agency or the United States Government. Appellant testified that he accompanied Mr. Kielsohn, as well as other vendors, to demonstrations. Likewise, the agency acknowledged that employees in appellant's office did (and still do) attend demonstrations of equipment and advise AUTODIN users of possible sources of equipment. . . . Appellant testified that the equipment demonstrated in Canada for installation in the Canadian SAMSON system, could not be used in the AUTODIN system. . . . Finally the statements, solicited by the agency, from the Canadian officials indicate that none of these individuals understood appellant to be acting in his agency capacity or acting in a manner which could have been perceived as adverse to the public's confidence in the integrity of the United States Government." Trachy v. Defense Communications Agency, 18 M.S.P.R. 317, 323-24 (1983)

It was not improper for appellant to recommend an associate to an agency contractor because "it was not an uncommon practice [for employees of the agency] to suggest subcontractors (to general contractors) . . . ." Faitel v. Veterans Administration, 26 M.S.P.R. 465, 469-70 (1985)

### **Misuse of Official Information:**

"We have no doubt that the government has a right and duty to govern the ethical conduct of its employees so as to ensure that they are in no way compromised in the performance of their duties. Even in situations which do not create a conflict of interest, the government may enforce reasonable regulations designed to ensure that a federal employee does not use knowledge gained through his employment for private financial gain." Miller v. United States Postal Service, 7 M.S.P.R. 572, 577-78 (1981), aff'd, 712 F.2d 1006 (6th Cir. 1983)

Disclosure of official government information "not made available to the general public" (ranking the relative technical capabilities of companies being considered for a government contract) to a potential subcontractor at a private meeting violated agency regulations prohibiting the disclosure of confidential information. Baker v. Department of Health and Human Services, 912 F.2d 1448, 1454-55 (Fed. Cir. 1990)

"The agency alleged . . . that the appellant . . . use[d] . . . information gained through agency employment in a manner contrary to the agency's interests. The agency therefore has the burden of showing that the appellant learned of the opportunity to make the loan to [relatives of a co-worker] through his position with the agency. The record reflects that the loan was the result of family connections and friendships, but the agency has presented no compelling reason to think that the appellant offered the loan even in part because of information he gained through his position with the agency." Marler v. Department of Veterans Affairs, 58 M.S.P.R. 116, 122 (1993)

In order for Privacy Act to apply to a record, the record must be part of a "system of records" as that term is defined in the Act, at 5 U.S.C. § 552a(a)(5). Thornhill v. Department of Army, 50 M.S.P.R. 480 (1991)

"With respect to the Privacy Act, the Board found that Mr. Morgan revealed only Captain Holland's middle name, but not his social security number, and therefore had not revealed any information 'from a system of records' as defined at 5 U.S.C. § 552a(a)(5)." Morgan v. Department of Army, 934 F.2d 310, \_\_\_\_ (Fed. Cir. 1991)

"[T]he administrative judge properly sustained the appellant's removal for the charge of . . . trading in national bank stock options based on non-public information obtained from his employment." Acree v. Department of Treasury, 80 M.S.P.R. 73, \_\_\_\_ (1998)

Appellant's disclosure of procurement information to an unauthorized person was not protected by the Whistleblower Protection Act, at 5 U.S.C. § 2302(b)(8), because disclosure of the

information was "specifically prohibited by law" (i.e., the Trade Secrets Act, 18 U.S.C. § 1905). However, § 15.413-1(a) of The Federal Acquisition Regulation (48 C.F.R.) is not a "law" that prohibited disclosure of the information. Kent v. General Services Administration, 56 M.S.P.R. 536 (1993)

"[A]ppellant's communications with the company represented efforts to use his position as a contract negotiator for his private gain. The letters he sent the company president clearly were efforts to obtain compensation from the company - or as the appellant stated, efforts to obtain 'a little financial security/assistance.' Furthermore, his references in each of those letters, to his alleged knowledge of a method for enhancing the company's position during the contract negotiations, clearly shows that the appellant was using his position as a contract negotiator to obtain this compensation." Gonzalez v. Department of Air Force, 51 M.S.P.R. 646, 650 (1991)

"[A]ppellant assert[ed] below that many of the documents that the agency claimed he should not have given his attorney were part of the administrative records of his equal employment opportunity (EEO) complaints. . . . Even if these documents were a part of the administrative records of the appellant's EEO complaints, this fact would not obviate the need to follow the agency's procedures for requesting these documents before the documents could be made public. Had the appellant made a request for the documents, the agency could have given him the information in a form which did not reveal the identity of the charging parties, the respondents, or persons supplying the information. See 29 C.F.R. § 1601.22. Thus, the fact that these documents may have been contained in the administrative records of the appellant's EEO complaints does not alter the fact that his disclosure of these documents to the public was prohibited." Clark v. Equal Employment Opportunity Commission, 42 M.S.P.R. 467, 473-74 n. 7 (1989)

### **Misuse of Government Property:**

"The misuse of government property is a serious charge." Morrison v. National Aeronautics and Space Administration, 65 M.S.P.R. 348, 357 (1994)

"[P]residing official erred in . . . requiring the agency to prove intent as part of its charge [of misuse of Government property]." Woodard v. Department of Army, 18 M.S.P.R. 492, 495 (1983)

"[T]he appellant essentially argues that lack of notice that the machine was a government copier is a defense to the charge because the agency must prove that he intended to misuse government property to sustain the charge. The appellant's assertion is

without merit. An agency is not required to prove intent to sustain a charge of unauthorized use of government property. . . . Rather, lack of notice is to be considered in assessing the reasonableness of the penalty imposed." Sternberg v. Department of Defense, Dependents Schools, 52 M.S.P.R. 547, 558 (1992)

"[T]he administrative judge incorrectly related the issue of notice to the proof of the charge rather than as a factor in mitigation of the penalty. An agency is not required to prove intent to sustain a charge of misuse of the property. . . . Furthermore, the fact that the appellant either did, or intended to, ultimately pay for the use of the fax and the phone does not negate his improper usage." Rogers v. Department of Justice, 60 M.S.P.R. 377, 389 (1994)

"The presiding official found that appellant had exercised bad judgment in taking the calculator [home for safekeeping] but that there was no evidence of intent to misuse . . . the property, given the fact that appellant had provided a substitute calculator. In its petition for review, the agency argues that the presiding official erred in finding that intent to misuse . . . the property had to be proven as an element of the charge. Rather, the agency contends that the basis of the charge is the unauthorized possession of the calculator by appellant at his residence, distinguishable from a charge of theft which requires proof of intent. We find no error in the presiding official's conclusions." Lacapurcia v. Department of Army, 27 M.S.P.R. 514, \_\_\_\_ (1985)

"Appellant also asserts . . . that the long-distance calls . . . did not amount to misuse of agency telephones because he paid for them. . . . [T]his argument has little merit because the crux of the charge is that the calls were unauthorized (personal in nature) and for an illegal purpose and not that he made the calls without paying for them." Wenzel v. Department of Interior, 33 M.S.P.R. 344, 353 (1987)

"The distinction between these uses [*i.e.*, personal use of agency telephones and personal use of agency computers] appears reasonable to us. An absolute prohibition on employees' personal use of agency telephones could be expected to cause serious inconvenience to employees, while a similar prohibition with respect to personal use of the computer generally could not be expected to have this result." Lemmon v. Department of Agriculture, 23 M.S.P.R. 506, \_\_\_\_ n. 6 (1984)

"[W]e are unpersuaded by the appellant's argument that his conduct of storing his personal documents on the hard disk of his office computer did not constitute 'use,' in that we interpret [the agency's standards of conduct regulation] to prohibit any use of the computer for other than official business." Barcia v. Department of Army, 47 M.S.P.R. 423, 429 (1991)

"[T]he *de minimis* value of an item is but one factor for consideration [in determining the appropriate disciplinary penalty for misusing government property]." Lovenduski v. Department of Army, 64 M.S.P.R. 612, 616 (1994)

"Ms. O'Neill's argument that the regulation concerning misuse of government property, 5 C.F.R. § 2635.704(a), must be read to have an implicit *de minimis* exception has some force. See Wisconsin Dep't of Revenue v. William Wrigley, Jr., Co., 505 U.S. 214, 231 (1992) ('[T]he venerable maxim *de minimis non curat lex* ['the law cares not for trifles'] is part of the established background of legal principles against which all enactments are adopted, and which all enactments [absent contrary indication] are deemed to accept.')." O'Neill v. Department of Housing and Urban Development, 220 F.3d 1354, \_\_\_\_ (Fed. Cir. 2000)

"Stanek's use of government property might not sustain a removal action by itself and, as a practical matter, may be widely permitted in government offices. Yet, a word processor is property as valuable as an automobile, and use of a government car for personal purposes is most severely frowned upon. Such acts do violate federal regulations." Stanek v. Department of Transportation, 805 F.2d 1572, 1577 (Fed. Cir. 1986)

"As to the charge against appellant Avant, of using government resources to conduct private business affairs, the administrative judge found that the agency 'has established preponderant proof that, to some extent, the appellant used government resources to conduct his private business affairs.' The basis for this conclusion was the presence, attached to Avant's government computer, of a disk (with his private business logo and pricing data) and an image scanner (for which he had no need in executing his official government duties). We find no error in the administrative judge's conclusion that since Avant presented no reasonable explanation for the presence of these items at his worksite, the Board may draw an inference of culpability from this circumstantial evidence. . . . We also note the administrative judge's finding that 'this charge is not in any significant way determinative of the outcome of the case,' and have weighed it similarly." Avant v. Department of Air Force, 71 M.S.P.R. 192, 200-01 (1996)

Attempt to discipline employee for use of agency computer for an outside volunteer activity, even though the employee had received the express permission of his supervisor to use the computer for that purpose and employee had stopped using the computer for that purpose two and one-half years before the disciplinary action was initiated. Tallis v. Department of Navy, 20 M.S.P.R. 108 (1984)

"Even if [appellant's use of his desk to store papers related to his outside business] constitutes a violation of the agency's requirement [to use Government equipment only for official business], it is in our view so minor (especially in the absence of

any showing that the appellant was aware of a prohibition on this use) that it cannot support adverse action against the appellant." Forrester v. Department of Health and Human Services, 27 M.S.P.R. 450, 458 (1985)

"[A]ppellant printed 20 sheets of paper related to her resume on the agency's computer printer during work hours. We find that the number of sheets printed is an aggravating factor under the circumstances, especially in light of the fact that she was previously disciplined for using her office computer for personal purposes. . . . The agency's deciding official determined that any mitigating factors were outweighed by significant aggravating factors, as follows: (1) At the time that the appellant was preparing her resume on her office computer, she had a large stack of work to do in her work basket and had failed to perform the daily task of picking up and distributing the 'receiving' mail for her section; (2) she was previously disciplined in 1989 for the same type of offense; (3) she was given three disciplinary suspensions during the past 3 years; (4) although she was rated as 'fully successful' in her last performance appraisal, she had serious performance problems, and her most recent interim appraisal indicated her performance was unsatisfactory; and (5) she denied all of the agency's allegations regarding her misconduct, and showed no remorse or rehabilitative potential. . . . [T]he deciding official properly considered these relevant factors and exercised management discretion within the bounds of reasonableness in determining the penalty of removal." Cobb v. Department of Air Force, 57 M.S.P.R. 47, 53-54 (1993)

60-day suspension found to be reasonable penalty for employee who, while off duty, twice used an agency photocopier to make a total of 11 copies of personal papers. Moore v. Department of Army, 32 M.S.P.R. 277 (1987)

Removal was a reasonable penalty for "appellant [who] made 153 personal telephone calls on agency time which were billed to the agency at a cost of over \$800.00, and [who] attempted to persuade a third party to lie about the nature of the calls." Lewis v. General Services Administration, 82 M.S.P.R. 259, \_\_\_\_ (1999)

"Inasmuch as government regulations clearly provide that frequent flyer miles derived from official travel are government property, see 41 C.F.R. § 301-1.103(f)(1), there can be no doubt but that discipline based on the sustained charge in this case promotes the efficiency of the service." Lewin v. Department of Justice, 74 M.S.P.R. 294, 299-300 (1997)

Unauthorized use of "government franked" mail. Laursen v. Veterans Administration, 4 M.S.P.R. 66 (1980)

Removal was a reasonable penalty for using and allowing others to use government printing equipment to run a pornography business. Scarberry v. Department of the Army, 23 M.S.P.R. 246, 247-48 (1984), aff'd, 770 F.2d 182 (Fed. Cir. 1985) (Table)

"Here, the agency was not required to prove intent to sustain the charge of misuse of a government credit card." Baracker v. Department of Interior, 70 M.S.P.R. 594, 602 (1996)

"The sustained charges . . . , [including] one instance of misuse of a government Diners Club card [to rent a motel room for personal use], are serious." Kye v. Defense Logistics Agency, 64 M.S.P.R. 570, 574 (1994), rev'd sub nom. on other grounds, LaChance v. Erickson, 522 U.S. 262 (1998)

Supervisor misused Government property (subordinate's office) when he had consensual sexual relations with her there. Vandergrift v. United States Postal Service, 26 M.S.P.R. 516 (1985)

Misuse of electronic mail ("love notes" sent to another employee). Dolezal v. Department of Army, 58 M.S.P.R. 64 (1993), aff'd, 22 F.3d 1104 (Fed. Cir. 1994) (Table)

Misuse of agency e-mail system to send "bizarre messages" unrelated to agency business to other employees, and misuse of government equipment to generate a memorandum unrelated to agency business. Bishopp v. Department of Air Force, 75 M.S.P.R. 33 (1997)

"[T]he evidence shows that the appellant's misuse of the government computer and printer was excessive. In addition, her personal use of the E-mail at work was also excessive and unnecessary to the performance of her duties." Rush v. Department of Air Force, 69 M.S.P.R. 416, 418 (1996)

Failure by agency to prove that the use of government property was unauthorized. Wolak v. Department of Army, 53 M.S.P.R. 251 (1992)

"[A]ppellant's use of government property . . . was initially authorized by his superiors. Thus, if a violation did occur, it was a technical violation of an unenforced policy." Davis v. Department of Army, 33 M.S.P.R. 223, 227 (1987)

"[T]he fact that appellant abused his supervisory authority in sanctioning misuse of government property casts considerable doubt on the propriety of his continued service as a supervisor." Perrotti v. Department of Army, 18 M.S.P.R. 548, 550 (1984)

"The agency contended that the appellant made three long distance telephone calls to his home on November 1, 1993. Although the agency's witness stated that these calls were on a long-distance billing, the bill establishes that the calls were not long distance. In sustaining this charge, the administrative judge

found that 'the agency has supported its charge that the appellant made three unauthorized calls on the cellular telephone assigned to him,' without stating whether the calls were long distance. The agency specifically charged, however, that the calls were long distance. The agency bears the burden of proving each of the elements of its charge. See *Burroughs v. Department of the Army*, 918 F.2d 170, 172 (Fed. Cir. 1990). Because it failed to do so, the charge cannot be sustained." Lanza v. Department of Army, 67 M.S.P.R. 516, 521 (1995), remanded on other grounds, 70 F.3d 1289 (Fed. Cir. 1995) (Table), on remand, 71 M.S.P.R. 6 (1996), review dismissed, 101 F.3d 716 (Fed. Cir. 1996) (Table)

Misuse of appropriated funds. Brown v. Department of Air Force, 67 M.S.P.R. 500 (1995)

## Conversion

"[T]he agency charged the appellant with [violating] 18 U.S.C. § 641. . . . Section 641 makes it unlawful to 'embezzle[], steal[], purloin[], or knowingly convert[] to [one's] use or the use of another . . . any record, voucher, money, or thing of value of the United States or of a department or agency thereof.' . . . [C]onversion under section 641 may be consummated without any intent to keep, and includes misuse or abuse of property, or use in an unauthorized manner or to an unauthorized extent. *Morissette v. United States*, 342 U.S. 246, 271-72 (1952). Conversion under section 641 does, however, require proof of a serious violation of the government's right to control the use of its property. See *United States v. May*, 625 F.2d 186, 192 (8th Cir. 1980). . . . [Also] a violation of section 641 . . . does require proof of criminal intent. *Morissette*, 342 U.S. at 263. . . . The facts and circumstances surrounding the appellant's actions in making and taking photocopies of agency documents support a finding that he had the requisite intent under section 641. In each instance, he removed and copied documents without the knowledge or consent of his supervisors, while no one else was around, and he admitted that he knew he was not supposed to have these documents. Not only were the appellant's actions unauthorized, they constituted a serious violation of the agency's right to control the use of its property. The photocopied documents contained sensitive and personal information, including social security numbers, a supervisor's comments about the work product of other employees, dates of birth, and service computation dates. The appellant's actions interfered with the agency's responsibility to ensure that such records are used only for the official government purposes for which they were created." Heath v. Department of Transportation, 64 M.S.P.R. 638, 645-46 (1994)



"[T]here is no de minimis monetary threshold that prevents the Board from sustaining a violation of [18 U.S.C.] section 641. . . . Although we found it unnecessary to address the issue in *Heath*, 64 M.S.P.R. at 644, we now find that the term 'thing of value' includes intangibles, such as the agency's Federal Express account number . . . . [T]he account number is a thing of value because it authorizes payment by the United States for a service performed by Federal Express. . . . Because the agency exercised control over the use of its Federal Express account number, it was a thing of value 'of the agency.'" Mann v. Department of Health and Human Services, 78 M.S.P.R. 1, 8-9 (1998)

### **Misuse of Official Time:**

Conducting personal business while on duty a misuse of official time. Cohen v. Department of Treasury, 7 M.S.P.R. 57 (1981)

"Wasting time" as basis for adverse action. Pitts v. Department of Navy, 7 M.S.P.R. 208 (1981)

Reading a newspaper while on duty a "serious offense." Cook v. Department of Navy, 34 M.S.P.R. 26, 28 (1987)

Failure by agency to prove that alleged use of government time was unauthorized. Wolak v. Department of Army, 53 M.S.P.R. 251 (1992)

### **Misuse of Subordinate Employee's Official Time:**

"[T]his type of misconduct, using subordinate employees to perform personal tasks while [they are] on official duty, is quite serious and warrants significant disciplinary action." Holt v. United States Postal Service, 63 M.S.P.R. 198, 203 (1994), aff'd, 59 F.3d 180 (Fed. Cir. 1995) (Table)

"[T]he appellant directed a work crew to perform work, with government tools and materials, on a private project while on duty . . . [and] the appellant told one of the crew members that his job would be jeopardized if he did not perform the work in question." Smith v. Department of Air Force, 36 M.S.P.R. 105, 106 (1988), aff'd, 862 F.2d 321 (Fed. Cir. 1988) (Table)

"[The Board's Administrative Law Judge] sustained two specifications of Charge IV, that respondent misused the OHA and its employees in furtherance of private legal matters. He sustained specification A, that the receptionist took messages on July 23, 1991 from two individuals who called respondent at the White Plains OHA office concerning legal matters (job injury cases) unrelated to

respondent's official duties, and specification B, that on September 22, 1992, an unnamed woman visited the White Plains office and left a folder for respondent containing legal documents unrelated to SSA business. Respondent objects that there is no evidence that he solicited the calls or the visit. We agree that this evidence is insufficient to support an inference that respondent authorized the callers to telephone or visit him at the office or gave them the address or telephone number. An individual who was aware of respondent's employment by the OHA would have little difficulty in obtaining its address and telephone number. Accordingly, we do not sustain Charge IV." Office of Hearings and Appeals, Social Security Administration v. Whittlesey, 59 M.S.P.R. 684, 695 (1993)

### **Outside Employment and Activities:**

"[T]he agency's standards of conduct require that an employee request approval before engaging in 'any off-duty employment.' We see no proper basis, therefore, for finding that the agency's knowledge that the appellant was working as an employee of a tax preparer eliminates any need to request permission to begin work as a self-employed CPA." Gonzalez v. Department of Air Force, 51 M.S.P.R. 646, 651 (1991)

"[A]ppellant contends that the presiding official erred in finding that the agency's failure to follow its own procedures did not constitute a defense of harmful procedural error. Specifically, appellant argues that he had provided his supervisor with an application to engage in outside employment (Form 7995) before he began his outside employment and that she failed to take any action on it or forward it to the appropriate officials; nor did she discuss the status of his application with him. He argues that he reasonably relied on his supervisor's conduct and that he would not have engaged in outside employment if he had been informed that it was prohibited. . . . We find that the supervisor's failure to process appellant's application for outside employment does not constitute a defense to be analyzed under the harmful procedural error standards set forth at 5 C.F.R. § 1201.56(c)(3) and our decision in *Parker v. Defense Logistics Agency*, 1 MSPB 489 (1980). . . . Rather, it may be more appropriately considered as a factor that goes towards determining whether the penalty imposed by the agency was within the parameters of reasonableness." Corbett v. Department of Treasury, 21 M.S.P.R. 544, 5\_\_-\_\_ (1984)

"The third charge against the appellant is based on his failure to submit a form 520 to the agency seeking advance approval of the 'outside activity' of owning (and leasing to others) real estate. The agency contends that the form 520, along with the approval of the agency, is required by section 169.21 of the agency's Inspection Operations Manual and by section 3118.3 of the FDA Staff

Manual Guide. The appellant, on the other hand, alleges that neither section covers activities such as ownership of real estate; and that his reporting of the ownership in an agency [confidential financial disclosure report] was sufficient to meet agency requirements with respect to this matter. We have reviewed the two sections of instructions which the agency has cited in support of its position. Neither section includes any clear statement that ownership of real estate is an 'outside activity' for which agency approval is required. Section 169.21 of the Inspection Operations Manual Guide provides that 'outside activities include . . . [e]mployment (whether compensated or not)' and six other activities. None of the latter six activities includes ownership of real estate. Furthermore, although the definition in section 3118.3 indicates that the list of activities is not exhaustive, and although ownership of real estate is not listed as a specific exception to the reporting requirement, we find that the activity of 'employment' (which is not described further in that section) cannot be assumed to include the 'activity' in which the appellant has engaged. In light of the absence of any clear indication that the agency's instructions require advance approval of the activity, we find that the agency has failed to support the third charge against the appellant by a preponderance of the evidence." [Footnotes omitted.] Forrester v. Department of Health and Human Services, 27 M.S.P.R. 450, 456-57 (1985)

Employee engaged in outside employment after obtaining approval of his supervisor, who did not have authority to grant such approval. The employee reasonably believed that his supervisor had authority to approve outside employment. Van Fossen v. Department of Housing and Urban Development, 748 F.2d 1579 (Fed. Cir. 1984)

"Appellant contended that his supervisor assented to his continuation of his private practice [of law], and the presiding official found that the supervisor's acquiescence constituted a mitigating factor. The supervisor attested in his affidavit that he and two other agency employees sought 'advice and assistance' from appellant on private matters, which the supervisor did not construe to constitute legal representation, and that he did not grant appellant permission to continue any private practice after appellant became a Federal employee . . . . Further, the courts have held that under the [agency]'s regulations governing employee conduct an employee who merely informs his supervisor of his possibly proscribed activities has not made an effective disclosure, because an employee may satisfy his fiduciary responsibility only by seeking advice and guidance on questions of conflict of interest from a deputy counselor designated by the agency. See United States v. Kenealy, 646 F.2d 699, 703-05 (1<sup>st</sup> Cir. 1981) (a Federal real estate appraiser's asserted 'disclosure' of his outside activities to his supervisors and in his employment application failed to satisfy his regulatory defense to his breach of fiduciary duty because he failed to request and receive advice and guidance from a deputy counselor on his possible

conflict of interest), *cert. denied*, 454 U.S. 941 (1981). The Board is not persuaded that appellant's alleged disclosure to his supervisor of his private practice of law is a substantial mitigating factor under these circumstances." Currie v. Department of Housing and Urban Development, 21 M.S.P.R. 720 (1984)

Free association clause of First Amendment did not bar agency from taking disciplinary action against an employee who attempted to engage in outside activity without obtaining prior written approval. Williams v. Internal Revenue Service, 919 F.2d 745 (D.C. Cir. 1990)

Standards of Ethical Conduct provision at 5 C.F.R. § 2635.807(a), prohibiting executive branch employee's receipt of travel expenses in connection with outside teaching, speaking, and writing the subject matter of which relates to the employee's official duties, is not enforceable against employees below the senior executive service level of employment. Sanjour v. United States Environmental Protection Agency, 7 F. Supp. 2d 14 (D.D.C. 1998), on remand from 56 F.3d 85 (D.C. Cir. 1995) (*en banc*)

"[A]ppellant's failure to report his outside employment despite his admission of prior knowledge of the reporting requirements is similarly not inconsequential in terms of its negative reflection of appellant's character or when viewed in the context of the fact that appellant's availability for necessary overtime duty would be impaired. In addition, an appearance of impropriety could result from appellant's employment with a trucking company subject to investigation by the agency." Meyer v. United States Customs Service, 18 M.S.P.R. 545, \_\_\_\_ (1984)

"[T]he permission the appellant apparently received while in good health to work in non-federal employment during off-duty hours does not implicitly cover a period of sick leave because [agency required specific approval for any outside employment during a period of sick leave and] the appellant was not in sick leave status at the time the original permission was given." Pardee v. General Services Administration, 54 M.S.P.R. 615, \_\_\_\_ (1992)

Employee's showing his supervisor the Standards of Ethical Conduct and telling her that nothing in them would support agency's denial of his request for prior approval of outside employment was not a disclosure protected by the Whistleblower Protection Act. Yost v. Department of Health and Human Services, 85 M.S.P.R. 273 (2000)

"In answer to the charges that he violated agency rules by engaging in the practice of law, respondent asserts that the agency's prohibition violates his First Amendment rights to freedom of speech and association. Whittlesey does not claim that there is a First Amendment right to practice law in violation of applicable rules, but he contends that, because speech is involved in the practice of law, under *National Treasury Employees Union (NTEU) v.*

*United States*, 990 F.2d 1271 (D.C. Cir.), *reh'g en banc denied*, 3 F.3d 1555 (1993), [*aff'd in part, rev'd in part, and remanded*, 513 U.S. 454 (1995),] the government may not constitutionally prohibit him from practicing law and representing clients in matters unrelated to his work or function. In *NTEU* the court found that section 501(b) of the Ethics in Government Act, banning federal employees from receiving honoraria for off-duty appearances, speeches or articles, violated the First Amendment as it applied to executive branch employees. The court held that the statutory prohibition was unconstitutionally overbroad because it was not limited to employees' receipt of payments where there was some nexus between the employee's job and either the subject matter of the expression or the character of the payor. *Id.* at 1275. The *NTEU* decision does not support respondent's argument because there is a nexus between the practice of law and the position of a judicial officer like the respondent [footnote omitted]. This connection is recognized by the American Bar Association (ABA) Code of Judicial Conduct which provides in Section 4G that, except when he or she is acting pro se or advising family members without compensation, '[a] judge shall not practice law.' The Board has previously found that the ABA Code is an appropriate guide for evaluating the conduct of administrative law judges. *Matter of Chocallo*, 1 M.S.P.R. 612, 652-53 (1978). The SSA Guide on Employee Conduct parallels this prohibition in Part VII, Section I, 'Restrictions Applying to Administrative Law Judges.' As the Guide explains, an appearance of impropriety and, in many cases, of conflict of interest is created when an individual acts as an advocate in disputes between parties who may later appear before the individual acting as an ALJ. We also agree with the agency that the prohibition is appropriate as a method of preventing collateral misuse of position and distraction from official duties. Respondent has shown no violation of his First Amendment rights." Office of Hearings and Appeals, Social Security Administration v. Whittlesey, 59 M.S.P.R. 684, 695-96 (1993)

### **Acting as an Agent of a Private Party Before an Agency:**

"Applying the well-settled common-law meaning of the term 'agent,' we conclude that the Board erred in finding that Ms. O'Neill acted as an agent under [18 U.S.C.] section 205(a)(2), because the government presented no evidence that Ms. O'Neill had actual or apparent authority to act on behalf of Altamont. In her submission to the Board, Ms. O'Neill claimed that Father Peter Young, the director of Altamont, would have testified at a hearing that Ms. O'Neill had no authority to conduct business on behalf of Altamont. The administrative judge, however, deemed such testimony irrelevant based on her conclusion that section 205 did not incorporate agency principles. The evidence offered by the government, and the findings of the administrative judge, established no

more than that Ms. O'Neill purported to represent the interests of Altamont. The evidence did not establish, and the administrative judge did not find, that her purported representation was authorized, either actually or apparently. She was therefore not shown to have been an 'agent' of Altamont in the sense that the term is used in the law of agency and in the sense that we understand the term to be used in section 205(a)(2). The Board therefore erred in concluding that Ms. O'Neill acted as an agent of a private party before a government agency, and her removal cannot be sustained on the ground that she violated 18 U.S.C. § 205(a)(2)." O'Neill v. Department of Housing and Urban Development, 220 F.3d 1354, 13\_\_ (Fed. Cir. 2000)

### **Conflict of Interest With Regard to Employee's Representative in an Administrative Proceeding:**

"The Civil Service Reform Act guarantees an employee the right to be represented . . . in an appeal before the [Merit Systems Protection] Board. . . . The Board's procedural regulations expand on this statutory entitlement by providing at 5 C.F.R. § 1201.31(b): 'A party may choose any representative as long as the person is willing and able to serve. However, the other party or parties may challenge the representative on the grounds of conflict of interest or conflict of position.' . . . [T]he term 'conflict of position' . . . was included in the regulation to ensure that a conflict of interest could be found even where no direct financial conflict is involved." Sweeney v. Department of Treasury, 3 M.S.P.R. 225, 228-29 (1980), recons. denied, 8 M.S.P.R. 641 (1981)

Union representative, designated by employee at hearing to serve as his representative, was disqualified because of a conflict of interest, *i.e.*, employee who would be represented was a supervisor whose subordinate employees were represented by the union. Shorter v. Department of Air Force, 28 M.S.P.R. 622 (1985)

"The appellant also filed a motion to disqualify the agency representative because the appellant filed an EEO complaint in which he alleged that the agency representative coached agency witnesses to lie during the hearing. Because the appellant has not established that the agency representative's involvement in the appellant's EEO complaint resulted in a conflict of interest or position, we deny the motion. See 5 C.F.R. § 1201.31 (a party may challenge the designation of the opposing party's representative on the ground that it involves a conflict of interest or a conflict of position); Sweeney v. Department of the Treasury, 3 M.S.P.R. 225, 228 (1980) (when considering allegations of conflict of interest, the burden of proof rests on the party moving for disqualification), recons. denied, 8 M.S.P.R. 646 (1981)." Metzenbuaum v. General Services Administration, 83 M.S.P.R. 243, \_\_ n.1 (1999)

### **Indebtedness:**

"The evidence shows that there was a dispute over the \$32 debt. Because of the dispute, it cannot be considered a just debt and appellant cannot be charged with failure to pay it." Vilt v. U.S. Marshals Service, 16 M.S.P.R. 192, 200 (1983)

"The agency may effect an adverse action against an employee only when it can establish that the employee's non-payment of just debts has or will have a deleterious effect on that employee's performance or on the ability of the agency to perform its assigned mission." Monterosso v. Department of Treasury, 6 M.S.P.R. 684, 689 (1981)

"In view of the time consuming nature of the creditors' communications to his supervisors and the disruption in the workplace caused by appellant's failure to pay his debts, we find that the agency established by a preponderance of the evidence that appellant's off-duty misconduct had a deleterious effect on his performance and on the agency's ability to perform its assigned mission." Cornish v. Department of Commerce, 10 M.S.P.R. 382, 384-85 (1982)

"We have combed the record for evidence relating appellant's non-payment of debts to his performance or the agency's accomplishment of its mission. Although on October 18, 1978, appellant had been counseled on his productivity, his performance was subsequently found satisfactory. The agency's evidence is, in effect, therefore, that appellant's nonpayment of debts tarnishes its image; other employees could be adversely affected if they were unable to get credit; and morale and production would be adversely affected without discipline. [Footnote: The agency also argued that the amount of time required to process complaints and counsel appellant interfered with the efficiency of the service. We have held that an agency's voluntary assumption of the role of intermediary with creditors, with the concomitant expenditure of time and effort by agency personnel, cannot be grounds to discipline an employee. Monterosso, 6 M.S.P.R. at 689.] None of this evidence is shown to be related to the agency's accomplishment of its mission in this case. . . . There is no evidence of any publicity resulting from appellant's repeated delinquencies. There was no evidence that appellant's creditors viewed his delinquency as other than personal to him or that based on appellant's behavior they would refuse credit to worthy risks because they were government employees . . . . Moreover, although appellant's debt problems were known to some of his co-workers and three had co-signed his loan from the credit union, it does not appear that apart from jibes about his indebtedness, his working relationships were affected. Cf. Yamaguchi v. Department of Navy, 7 M.S.P.R. 671 (1981). Thus, we cannot find evidence in this record that rises to the preponderance necessary to show a nexus between appellant's

nonpayment of his debts and the efficiency of the service." Byars v. Department of Army, 9 M.S.P.R. 225, 228-29 (1981)

"[Appellant's] failure to pay her just debts in a proper and timely manner is serious misconduct since her position as Travel Assistant involved fiduciary responsibilities and required her to administer that very same program." Dorrrough v. Department of Commerce, 41 M.S.P.R. 87, 91 (1989)

"The petitioner has been punished by the reprimand order that was issued to her on the indebtedness charge before it was dismissed. It was authorized by the contract between the agency and Diners Club and by the agreement petitioner signed when she applied for the Diners Club card. It was also authorized by GSA regulation 41 C.F.R. § 105-735-210 . . . , requiring personnel to pay their just financial obligations in a proper and timely manner. . . . This reprimand was issued because petitioner failed to pay her Diners Club indebtedness in a proper and timely manner and allowed it to become delinquent for 120 days. Under these circumstances, the reprimand was proper and justified. It will remain in her personnel file for three years." Phillips v. General Services Administration, 878 F.2d 370, \_\_\_\_ (Fed. Cir. 1989)

"[W]e find that the agency proved the specification of the appellant's tax indebtedness to the Internal Revenue Service based on his failure to timely pay his tax obligations for the years in question and that proof of that specification is sufficient to prove the agency's charge that the appellant violated its Minimum Standards of Conduct." Crawford v. Department of Treasury, 56 M.S.P.R. 224, \_\_\_\_ (1993)

No "reasonable connection" found between the employee's failure to pay a debt owed to a private creditor and the efficiency of the service. White v. Bloomberg, 345 F. Supp. 133 (D. Md. 1972)

### **Violation of Ethics Agreement:**

"Here it was made clear to appellant that he must divest his interest in [a company with which his Department did substantial business] in order to be hired by the Department, and he had represented that he had done so. Therefore, in light of the government's compelling interest in avoiding conflicts of interest on the part of its employees, and in upholding the integrity of the federal service, appellant's argument that his punishment [removal] was too harsh must fail." Smith v. Department of Interior, 6 M.S.P.R. 84, 88-89 (1981)



**Falsification of Financial Disclosure Report/Concealment of a Financial Interest:**

In order for charge of falsification of government document to be sustained, agency must prove by preponderant evidence that the employee knowingly supplied incorrect information with the specific intent to defraud or mislead the agency. Naekel v. Department of Transportation, 782 F.2d 975, 977 (Fed. Cir. 1986)

Employee's failure to list debt owed him by successful bidder on agency contract was a financial interest for which disclosure was required; although employee's financial relationship with bidder was not of type specifically provided in the disclosure form as an example of a reportable interest, the form provided sufficient information so that he should have known to list it. Also, employee's failure to list his interest in real estate supported charge of submitting false information on official government document; because employee rented part of that property, "his claim that the property was excludable as his residence is incredible." Connett v. Department of Navy, 31 M.S.P.R. 322, 326-27 (1986), aff'd, 824 F.2d 978 (Fed. Cir. 1987) (Table)

"[P]reponderant evidence supports the charge that the appellant intentionally concealed his financial interest in [a company] by purchasing the stock in his brother's name." Zukowski v. Department of Commerce, 43 M.S.P.R. 51, 55 (1989)

OPM Regulations Regarding  
Employee Responsibilities and Conduct

**Gambling (5 C.F.R. § 735.201):**

Hunt v. Department of Health and Human Services, 758 F.2d 608 (Fed. Cir. 1985): "The purpose and need for such a regulation for government employees on duty in official quarters is manifest. . . . In this case we squarely decide that a violation of the anti-gambling regulation, even for a first-time offense, is punishable by removal for the efficiency of the service where the evidence to support the charge is substantial and credible, and the decision is not arbitrary, capricious, or unlawful."

Howard v. United States Postal Service, 26 M.S.P.R. 393, 397 (1985): "We find no error in the presiding official's conclusion that gambling at a Government facility can and does have a deleterious effect on the efficiency and morale of the workforce."

Ricci v. United States, 507 F.2d 1390, 1398 (Ct. Cl. 1974): "[R]egulations aimed at discouraging employees from participating in gambling serve a useful purpose to curtail employee involvement and for first offenders, warrant a penalty less severe than dismissal. But when an employee elevates his activity from the placing of an individual bet to that of serving as an outlet for his fellow employees' gambling proclivities, be it on his own account or as an agent for others, his effect on overall morale and efficiency becomes multiplied, thus justifying the more serious first offender penalty of possible discharge."

Luna v. Department of Army, 38 M.S.P.R. 696 (1988) (Operation of depot-wide football pool.)

Landreth v. Tennessee Valley Authority, 20 M.S.P.R. 359 (1984) (Sale of numbers slips to co-workers at duty station during work hours.)

**Conduct Prejudicial to the Government (5 C.F.R. § 735.203):**

Goldstein v. Department of Treasury, 62 M.S.P.R. 622, 626-27 (1994), vacated and remanded on other grounds, 51 F.3d 1570 (Fed. Cir. 1995), vacated after remand on other grounds, 62 F.3d 1420 (Fed. Cir. 1995) (Table): "In charging the appellant with conduct unbecoming a Secret Service Uniformed Division Officer, the agency cited 31 C.F.R. § 0.735-57, which provides that an employee shall not engage in criminal, infamous, dishonest, or notoriously disgraceful conduct, or any other conduct prejudicial to the government. . . . [T]he appellant . . . contended that the regulation under which he was charged was unconstitutionally vague

and did not inform him in advance of what conduct was proscribed so that he could direct his behavior accordingly. . . . The Board has found regarding this issue, however, that an agency is not required to describe in detail all potentially proscribed employee conduct and resulting discipline. See *Brown v. FAA*, 15 M.S.P.R. 224, 233 (1983), *rev'd in part on other grounds*, 735 F.2d 543 (Fed. Cir. 1984). In doing so, it cited the following observation by the Court of Appeals for the District of Columbia Circuit:

[I]t is not feasible or necessary for the Government to spell out in detail all that conduct which will result in retaliation. The most conscientious of codes that define prohibited conduct of employees include 'catchall' clauses prohibiting employee 'misconduct,' 'immorality,' or 'conduct unbecoming.'

See *id.*, citing *Meehan v. Macy*, 392 F.2d 822, 835, *modified*, 425 F.2d 489 (1968), *aff'd en banc*, 425 F.2d 472 (D.C. Cir. 1969), as cited in *Brousseau v. United States*, 640 F.2d 1235, 1247 (Ct. Cl. 1981). As the Board noted, this observation has been quoted with approval by the Supreme Court. See *id.*, citing *Arnett v. Kennedy*, 416 U.S. 134, 161-62 (1974). The framing of this conduct unbecoming charge under a provision proscribing general misconduct prejudicial to the government thus did not render the charge unconstitutionally vague. See *Brown*, 15 M.S.P.R. at 233."

Vilt v. U.S. Marshals Service, 16 M.S.P.R. 192, 199 (1983) (Agency must prove intent when it charges an employee with dishonest conduct.)

Kirkpatrick v. United States Postal Service, 74 M.S.P.R. 583, \_\_\_\_ (1997): "We have long recognized that removal for . . . dishonest activity promotes the efficiency of the service since such behavior raises serious doubts regarding the employee's reliability, trustworthiness, and continued fitness for employment."

Walker v. Department of Navy, 59 M.S.P.R. 309, \_\_\_\_ (1993): "According to the undisputed evidence, the appellant exposed his penis to Bryan while on duty on at least two occasions. If such behavior does not constitute disgraceful conduct, we are at a loss to imagine what would. Accordingly, the administrative judge erred in not sustaining the charge of disgraceful conduct regarding the appellant's behavior toward Bryan, regardless of whether she consented to it."

Bonet v. United States Postal Service, 661 F.2d 1071 (5th Cir. 1981), on remand, 11 M.S.P.R. 141 (1982) (There must be public knowledge of the conduct in order for it to be "notorious.")

Lawley v. Department of Treasury, 84 M.S.P.R. 253, \_\_\_\_ (1999): "We also find the present record sufficient to conclude that the appellant established that she had made a whistleblowing

disclosure, i.e., that she disclosed information she reasonably believed evidenced a violation of law, rule, or regulation, when she reported that employees in an agency training course cheated on a written examination . . . . Although the appellant did not identify a particular law, rule, or regulation that was violated, we note that such cheating would violate the regulation which provides that 'an employee shall not engage in criminal, infamous, dishonest, immoral, or notoriously disgraceful conduct, or other conduct prejudicial to the Government.' 5 C.F.R. § 735.203."

Wenzel v. Department of Interior, 33 M.S.P.R. 344 (1987), aff'd, 837 F.2d 1097 (Fed. Cir. 1987) (Table) (*Nolo contendere* plea by employee charged with violating laws it was his job to enforce)

Scofield v. Department of Treasury, 53 M.S.P.R. 179 (1992) (Employee's violent, criminal conduct that caused physical injury)

Buffalow v. Department of Labor, 23 M.S.P.R. 280 (1984) (Shooting a minor with a deadly weapon)

Fleming v. Department of Agriculture, 24 M.S.P.R. 485 (1984) (Conviction for receiving or aiding in the concealment of stolen property)

Doe v. National Security Agency, 6 M.S.P.R. 555 (1981) (Incest)

Crofoot v. U.S. Government Printing Office, 21 M.S.P.R. 248 (1984), aff'd, 761 F.2d 661 (Fed. Cir. 1985), aff'd after remand on other grounds, 823 F.2d 495 (Fed. Cir. 1987) (Fraudulent workmen's compensation claim filed by employee)

Gamble v. United States Postal Service, 6 M.S.P.R. 578 (1981) (Welfare fraud)

Albin v. Department of Justice, 25 M.S.P.R. 305, \_\_\_\_ (1984): "[A]ppellant was observed [while off-duty at a convention where he was escorting inmates in connection with his duties] dressed only in his undershorts 'and/or naked' in public places by the hotel employees."

Taylor v. Department of Navy, 35 M.S.P.R. 438 (1987), aff'd, 861 F.2d 728 (Fed. Cir. 1988) (Table) (Employee's involuntary manslaughter of her son)